Filed 12/16/08 Gilb v. City of La Mesa CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WALTER GILB et al., Plaintiffs and Appellants, v. CITY OF LA MESA et al., Defendants and Appellants.	D052337 (Super. Ct. No. GIE036874)

APPEAL from a judgment of the Superior Court of San Diego County, Jan I. Goldsmith, Judge. Affirmed.

Plaintiffs and appellants Walter and Virginia Gilb appeal a grant of summary judgment entered in favor of the City of La Mesa (City) on plaintiffs' complaint alleging that a street corner constituted a dangerous condition of public property. Plaintiffs contend summary judgment was improper because (1) the issue regarding the dangerous condition was not resolvable as a matter of law, and (2) they presented evidence raising

triable issues of fact as to whether the street corner constituted a dangerous condition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gilb, through his guardian ad litem Marlene Carroll, sued City for negligence, "negligence-premises liability" and negligence per se. His wife, Virginia, alleged causes of action for emotional distress and loss of consortium. The complaint alleged the following occurred during daylight hours on approximately November 7, 2006: Gilb and his wife were "walking in a northeasterly direction across Acacia Ave[nue] in the City of La Mesa. As [he] approached the handicap ramp at the north eastern intersection of Acacia Ave[nue] and Orange Ave[nue] . . . he caught his shoe in a trench that was present [at the corner] . . . [he] fell forward and landed on the sidewalk head first, causing grave and serious damages to [him], including but not limited to a broken neck and fractured wrist."

On July 23, 2007, City moved for summary judgment arguing: (1) as a matter of law the complained of street corner did not constitute a dangerous condition under Government Code section 830, subdivision (a)[1]; (2) the condition of the street corner presented such a minor risk of injury when used with due care, that it did not entitle plaintiffs to recover any damages under section 830.2; and (3) City did not create the condition and did not have actual or constructive notice of it.

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1 All further statutory references are to the Government Code unless otherwise stated.

Michael Kinnard, a City engineer, submitted a declaration stating that on June 20, 2007, he examined the street corner, and it was essentially in the same condition as when Gilb fell. Kinnard took measurements and photographs. His declaration stated, "Over the years, the passage of water and other natural elements over the paved portion of the intersection at its juncture with the ramp at the Easterly corner has eroded some of the street. The process of erosion is normal wear on the street and occurs throughout any city." He added, "measurements of the irregularly eroded portion of the roadway reveal the deepest portion to be [one-half inch to five-eighths] inch below surrounding street grade . . . . At the place where the eroded area is deepest ([five-eighths] of an inch. . . .), the eroded area begins at the bottom of the lip of the ramp and extends between two and one-half and two and three quarters inches toward the center of the intersection. . . . The maximum depth does not extend the entire width of that area. It varies between [five-eighths] inch and less than one quarter of an inch." He also stated, "The area of Mr. Gilb's reported fall has, to my knowledge and according to the records of the City, never been the subject of any complaints nor prior accidents which in any way relate to the condition of the surface of the roadway or the ramp at the Easterly corner." It was undisputed that Virginia Gilb "traveled that same path previously but [had] not encountered any problem."

In opposition to City's motion, plaintiffs argued there were triable issues of material fact regarding the measurements of the cracks in the pavement, the manner of computing the measurements, and whether City had constructive notice of the condition.

Plaintiff's expert, Jack Debes, Ph.D., stated in a declaration, "I made my own

measurements . . . of the admittedly eroded area. My measurements revealed cracks, changes in elevation, and gaps of greater than [one-half] inch at nearly every point along approximately three feet of eroded pavement. In fact, Mr. Kinnard's own photograph . . . indicates that he placed his ruler at the bottom of the natural curb, and not, as seen in the photograph, into the actual defect immediately below it, which appears to measure in excess of [one] inch."

The trial court granted the motion in favor of City, ruling that as a mater of law the street corner where Gilb fell was not a dangerous condition, even taking into account the differing measurements done by plaintiffs' expert. The court did not address the remaining issues raised by City.

DISCUSSION

A defendant moving for summary judgment must show either (1) one or more elements of the plaintiff's cause of action cannot be established or (2) there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) When the motion is based on the assertion of an affirmative defense, the defendant has the initial burden to demonstrate that undisputed material facts support each element of the affirmative defense. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289; see *Aguilar*, at p. 850, fn. 11.) "The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does 'the burden shift[ ] to plaintiff to

show an issue of fact concerning at least one element of the defense.' " (*Anderson*, at pp. 289-290.)

The summary judgment procedure determines whether there is evidence requiring the fact-weighing procedure of a trial. (E.g. *Guz*, *supra*, 24 Cal.4th at p. 334.) Thus, " 'the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves.' [Citation.] The trial judge determines whether triable issues of fact exist by reviewing the affidavits and evidence before him or her and the reasonable inferences which may be drawn from those facts." (*Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 131.) A material issue of fact may not be resolved based on inferences if contradicted by other inferences or evidence. (*Aguilar*, *supra*, 25 Cal.4th at p. 856.)

On appeal, the reviewing court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Guz*, *supra*, at pp. 334-335.) We view the evidence in the light most favorable to the plaintiff, construing the defendant's evidence strictly and plaintiff's evidence liberally, and resolve any doubts as to the propriety of granting the motion in favor of the plaintiff. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499.)

Under the California Tort Claims Act, public entities are not liable for injuries "[e]xcept as otherwise provided by statute[.]" (§ 815.) A public entity may be liable for injuries caused by a dangerous condition of its property. (§ 835.) Under section 830, subdivision (a), " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when

such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

Whether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may be resolved as a question of law only if reasonable minds can come to but one conclusion. (§ 830.2; *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810; *Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194.) "Section 830.2 . . . sets forth the criteria for a court to conclude as a matter of law that a condition is not dangerous within the meaning of section 830: 'A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.' " (*Peterson*, 36 Cal.3d at p. 810, fn. 9.)

"It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the

rule were otherwise the city could be held liable upon a showing of a trivial defect." (*Whiting v. City of National City* (1937) 9 Cal.2d 163, 165.)

"[W]hen a court determines whether a given defect is trivial, as a matter of law, the court should not rely merely upon the size of the depression. While size may be one of the most relevant factors to the decision, it is not always the sole criterion. Instead, the court should determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate. As such, the court should view the intrinsic nature and quality of the defect to see if, for example, it consists of the mere nonalignment of two horizontal slabs or whether it consists of a jagged and deep hole. The court should also look at other factors such as whether the accident occurred at night in an unlighted area. Furthermore, the court should see if there is any evidence that other persons have been injured on this same defect. [¶] . . . [W]hen the only evidence available on the issue of dangerousness does not lead to the conclusion that reasonable minds may differ, then it is proper for the court to find that the defect was trivial as a matter of law." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.)

Gilb contends the difference in measurements created triable issues of material fact, and the following circumstances surrounding the accident rendered the defects at the street corner more dangerous than indicated by the measurements alone: "1) the surface of the eroded area is jagged, with several elevation changes that pose trip hazards to pedestrians, 2) the eroded portions of the defect are deep enough to collect debris, 3) the erosion along the lip of the pedestrian ramp creates an acute angled face, which increases

the severity of the trip hazard, 4) at one point along the crack, the erosion extends [five-eighths] of [an] inch . . . below the street level, while abutting a [portion] of the ramp's lip that is [five-eighths] of [an] inch . . . above street level, resulting in a total vertical projection, i.e. a trip hazard, of a one and a quarter inch . . . . The defect itself is located [at] the base of pedestrian ramp transitioning between the street and the sidewalk."

Here, the defects were the result of normal wear and tear, and were so trivial or insignificant that, in view of the surrounding circumstances, no reasonable person would conclude that the condition created a substantial risk of injury when such property was used with due care. (Accord, *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.) Even taking into account the experts' differing measurements of the cracks at the street corner, the defects were trivial and the differences were not material. "To be 'material' for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way." (*Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653.) Moreover, the measurements are but one factor to consider; other factors relate to the circumstances surrounding the accident. Here, Gilb was walking in daylight hours. The City had never previously been made aware of any accident at that site. Virginia Gilb passed that street corner many times previously but encountered no problems. Accordingly, we conclude that there is no need for a trial to resolve the factual issues contested by the parties because a trial would not make any difference in the legal result compelled by the application of the relevant law, that the street corner where Gilb fell did not constitute a dangerous condition.

DISPOSITION

The judgment is affirmed. The City of La Mesa is awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.